FILED
JAN 31 195
JOHN T. FEY, CL

IN THE

Supreme Court of the United States

October Term, 1956

No. 735

UNION LEADER CORPORATION,
Petitioner,

v.

WALTER D. McLAUGHLIN,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

---

WALTER E. BARTON,
Investment Building,
Washington 5, D. C.

ROBERT W. UPTON,
14 Park Street,
Concord, New Hampshire.
Counsel for Petitioner.

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

SUBJECT INDEX
PETITION FOR WRIT

PAGE

Opinion Below 7

Jurisdiction 2

Questions Presented 2

Constitutional Questions Involved 3

Statement of the Case 4

Reasons for Granting the Writ 7

I. The Supreme Court of New Hampshire Has Decided A Substantial Federal Question Contrary to the Decisions of This Honorable Court 7

A. The Federal Questions Were Timely Raised 7

B. The Judiciary Is Subject to the Provisions of the Fourteenth Amendment 8

C. The Federal Questions Raised Are Substantial 9

II. Petitioner Was Deprived of Its Property Without Due Process of Law 9

A. Due Process Requires a Fair and Impartial Jury 9

B. Due Process Requires Right of Cross Examination 11

III. Petitioner Was Denied the Equal Protection of the Law 12

Prayer 12

Table of Cases Cited

Baker v. *Hudspeth* (1942), 129 F. (2d) 779, cert. den. 63 S. Ct. 264, 317 U. S. 681, 87 L. ed. 546, reh. den. 63 S. Ct. 767, 317 U. S. 711, 87 L. ed. 1164.... 9

PAGE

Bolling v. *Sharpe*, (1954), 74 S. Ct. 693, 694, 317 U. S. 497, 499, 98 L. ed. 884, 886 12
Capital Traction Co. v. *Hof* (1899), 19 S. Ct. 580, 585, 174 U. S. 1, 15, 43 L. ed. 873, 878 9
Grosjean v. *American Press Co.*, (1936), 56 S. Ct. 444, 447, 297 U. S. 233, 244, 80 L. ed. 660, 665 8
Hagar v. *Reclamation District* (1884), 4 S. Ct. 663, 667, 111 U. S. 701, 708, 28 L. ed. 569, 572 10
Hill v. *State of Texas*, (1942), 62 S. Ct. 1159, 1162, 316 U. S. 400, 406, 86 L. ed. 1559, 1563 12
Market Street Ry Company v. *Comm.* (1945), 65 S. Ct. 770, 777, 324 U. S. 548, 562, 89 L. ed. 1171, 1182 12
Mooney v. *Houlihan* (1935), 55 S. Ct. 340, 341, 342, 294 U. S. 103, 112, 79 L. ed. 791, 794 8
Railroad Comm. of California v. *Pacific G. E. Co.* (1938), 58 S. Ct. 334, 338, 302 U. S. 388, 393, 82 L. ed. 319, 322 9
Remmer v. *U. S.* (1956), 76 S. Ct. 425, 428, 350 U. S. 377, 382, 100 L. ed. 328, 331 11
Thiel v. *Southern Pacific R. R. Co.* (1946) 66 S. Ct. 984, 985, 328 U. S. 217, 220, 90 L. ed. 1181, 1184.... 8
Tumey v. *Ohio* (1927), 47 S. Ct. 437, 445, 273 U. S. 509, 535, 71 L. ed. 749, 759 ..... 8, 10
United States v. *Wood*, 299 U. S. 123, 145, 57 S. Ct. 177, 81 L. ed. 78 10
U. S. v. *ex rel. Thompson* v. *Dye* (1952), 103 F. Supp. 776, 778, affd. 203 F. (2d) 429, cert. den. 73 S. Ct. 496, 345 U.S. 960, 97 L. Ed. 1380 10
Williams v. *Georgia* (1955), 75 S. Ct. 814, 822, 349 U. S. 375, 389, 99 L. ed. 1161, 1173 8

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment 3

STATUTES

Title 28, U. S., Sec. 1257 (3) 2

APPENDIX

PAGE

Opinion of Supreme Court of New Hampshire, November 29, 1956 ..... 1A
Judgment of Supreme Court of New Hampshire, November 29, 1956 ..... 3A
Petitioner's Motion To Vacate Order Denying Motion for New Trial and for a New Trial Raising Federal Questions, November 4, 1955 ..... 5A
Trial Court's Order Denying Petitioner's Motion, March 2, 1956 ..... 8A
Motion of Respondent for Findings of Fact and Rulings of Law 9A
Trial Court's Order on Respondent's Motion, March 2, 1956 ..... 10A
Opinion of Supreme Court of New Hampshire, July 8, 1955 ..... 11A
Petitioner's Motion To Set Aside Verdict, November 18, 1953 ..... 15A
Trial Court's Order Denying Petitioner's Motion, February 8, 1954 ..... 16A

IN THE

Supreme Court of the United States

October Term, 1956

No.

UNION LEADER CORPORATION,
Petitioner,

v.

WALTER D. McLAUGHLIN,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New Hampshire

---

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Union-Leader Corporation, prays that a writ of certiorari be issued to review the final judgment of the Supreme Court of the State of New Hampshire entered on November 29, 1956 in *Walter D. McLaughlin* v. *Union-Leader Corporation*, No. 4527 on the docket of that Court. (R. 370, App. A, 3A.)

OPINIONS BELOW

The original opinion of the Supreme Court of New Hampshire dated July 8, 1955 was reported in 99 N. H. 492. The final opinion of that Court dated November 29, 1956 has not yet been reported. The pertinent por-

tions of both opinions (R. 299, App. A, 1A; R. 367, App. D, 11A), Judge Duncan's dissenting opinion (R. 370, App. A, 3A), the final judgment of the Supreme Court dated November 29, 1956 (R. 370, App. A, 3A), and the motion raising the federal questions in the trial court (R. 320, App. B, 5A), as well as the action of the trial court thereon (R. 322, App. B, 8A), are contained in the Transcript of the Record and printed in the Appendix of this petition on the pages indicated above.

JURISDICTION

The final judgment of the Supreme Court of New Hampshire was entered on November 29, 1956. (R. 370, App. A, 3A.) No motion for a rehearing was filed by either party. The jurisdiction of this Honorable Court is invoked under the provisions of Title 28, U. S. C., Section 1257 (3), which is applicable to petitions for writs of certiorari with respect to final judgments of state courts where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States. Motion to stay enforcement of judgment granted December 28, 1956. (R. 372.)

QUESTIONS PRESENTED

1. Whether petitioner was deprived of its property without due process of law within the meaning of Section 1 of the Fourteenth Amendment of the Constitution of the United States. (R. 320, 321, App. B, 5A, 7A.)

2. Whether petitioner was deprived of the equal protection of the laws within the meaning of Section 1 of the Fourteenth Amendment of the Constitution. (R. 320, 321, App. B, 5A, 7A.)

The questions arose as a result of the trial court's denial of petitioner's motion to vacate order denying

petitioner's motion for new trial and for a new trial (R. 322, App. B, 5A, 8A), and the affirmance of the trial court's action by the Supreme Court of New Hampshire (R. 367, App. A, 2A, 3A), Judge Duncan dissenting. (R. 370, App. A, 3A.) Petitioner's motion was based on the grounds that petitioner was deprived of its property without due process of law and denied the equal protection of the laws within the meaning of Section 1 of the Fourteenth Amendment, as a result of a juror's misconduct in seeking and obtaining information outside the court room on two different occasions from a person who never was called as a witness. (R. 262-270, 288-297, App. B, 5A-8A.) The information obtained was prejudicial to petitioner; petitioner had no opportunity of cross examination of the person who was interviewed outside of the court room by the juror; petitioner was denied the right to cross examine the juror to determine which of his inconsistent testimony before the trial judge was correct (R. 291); and the juror himself testified that he sought this outside information for the purpose of helping him make a decision. (R. 263, App. B, 5A, 6A.)

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment of the Constitution of the United States, which reads as follows, is involved:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U. S. C., Const. Amend., Part 3, p. 2.)

STATEMENT OF THE CASE

Respondent sued petitioner in the Superior Court of Hillsborough County, New Hampshire, on September 22, 1949 for alleged breach of his contract of employment as advertising manager of petitioner (R. 2, 3), the publisher of a newspaper. (268.) The question turned on whether petitioner breached the contract by granting respondent a leave of absence with pay. (R. 2, 3.) Petitioner contended that respondent had been given a leave of absence with pay because he failed to perform his duties faithfully and efficiently; and the respondent claimed that the leave of absence constituted a discharge without reasonable cause. (R. 4.)

During the course of the trial it came to the attention of counsel for petitioner that one of the jurors had sought and obtained information pertaining to the case from some one outside the court room. Petitioner promptly moved for a mistrial (R. 220), which was denied (R. 223), the trial court taking the position that the question should be brough up after verdict. (R. 223, 225.) A verdict of $37,745.37 was returned against petitioner on November 12, 1953 (R. 262, 299), and on November 18, 1953 petitioner filed a motion to set aside the verdict on the ground of the misconduct of the juror. (R. 264, App. E, 15A.)

Following the filing of petitioner's motion, the testimony of the juror and other parties was taken. (R. 262-297.) The trial court denied petitioner's motion on February 8, 1954 without opinion (R. 265, App. E, 16A), and the Supreme Court of New Hampshire on appeal affirmed the trial court on this particular question on July 8, 1955. (R. 303, 304, App. D, 11A-13A.)

The case was remanded by the Supreme Court to the trial court for determination of whether respondent would be required to pay additional income taxes by

reason of his receipt of the entire recovery in one year. (R. 304, App. D, 13A.) There was still pending in the trial court respondent's motion for the allowance of interest, which was withdrawn from the jury and reserved by the trial court for decision at the time of trial. (R. 197, 260, 353, 356.) At this posture of the case, there was no final judgment of the trial court or of the Supreme Court, and there could be none until these two issues were decided.

After the case was remanded to the trial court, petitioner on November 4, 1955 filed a motion to vacate the order denying petitioner's motion for a new trial and for a new trial, in which petitioner raised the federal questions arising under the Fourteenth Amendment. (R. 320, 321, App. B, 5A-8A.) The trial court denied petitioner's motion on March 2, 1956 (R. 322, 323, App. B, 8A), and petitioner took a timely appeal to the Supreme Court. The Supreme Court passed upon the merits of the question and affirmed the trial court, entering judgment on the verdict on November 29, 1956, Judge Duncan dissenting. (R. 367, 370, App. A, 2A, 3A.) This is the first and the final judgment of the Supreme Court of New Hampshire involving the federal questions in respect of which this petition for a writ of certiorari is filed.

The testimony taken after the verdict of the jury showed that on the afternoon of the day the trial started (R. 264, 292), one of the jurors, Korcoulis, conferred outside the court room with one DeNies, an advertising solicitor of petitioner, for the purpose of obtaining information which Korcoulis himself testified "would be helpful in order for me to make a decision." (R. 263, 266.) Korcoulis had known DeNies for about twenty-five years. (R. 265.) DeNies had worked under respondent when he was petitioner's advertising manager, and DeNies was friendly with him. (R. 265.) Among other things, Korcoulis asked DeNies whether respondent was

a drinking man and whether he abused the help, to which DeNies replied "No." (R. 262, 266, 289, 291.) Korcoulis then remarked that it was "funny they fired him," to which DeNies replied "That is right." (R. 289.) Asked by Korcoulis whether he expected to testify, DeNies replied "I hope not, because what can I say about the old man; he is all right. I am working for the company. I hope they never will call me to testify." (R. 289, 292.) Korcoulis then advised DeNies not to testify, saying that if he went on the stand respondent's lawyer will "tear you up." (R. 291, App. B, 5A.)

Near the close of the trial, Korcoulis again talked with DeNies regarding the trial (R. 266), and particularly about respondent's witness Finder, who, Korcoulis said, "looked like a million dollars." (R. 290.) Finder formerly owned one-half of the stock of petitioner and testified on behalf of respondent as an unfriendly witness against petitioner. (R. 168.) Korcoulis also discussed with DeNies a certain letter written by Finder when he was participating in the management of the petitioner, and remarked that it looked as if petitioner were trying to get rid of respondent when it was written about a year before the trial. (R. 267, App. B, 6A.) All of these comments were prejudicial to petitioner.

Korcoulis was examined by the trial judge on two different occasions. The first time was immediately after the verdict, when he testified that he did not discuss Finder's testimony with DeNies. (R. 262.) The second occasion was after DeNies testified that he did, when Korcoulis confirmed DeNies' testimony that he did discuss Finder's testimony with him. (R. 292.) Furthermore, contrary to Korcoulis' first testimony immediately after the verdict that he sought and maintained the information from DeNies in order to help him come to a decision (R. 263, 266), Korcoulis later testified that he did not consider it in arriving at a verdict (R. 294, 295),

and that he did not discuss DeNies' prejudicial testimony in the jury room. (R. 295, 296.) The trial judge, however, refused to examine the other jurors to verify Korcoulis' conflicting testimony. (R. 296.) Unquestionably, he could not erase from his mind the prejudicial testimony of DeNies, which he admittedly sought and obtained outside the court room for the purpose of helping him come to a decision, notwithstanding his later testimony to the contrary.

REASONS FOR GRANTING CERTIORARI

I

The Supreme Court of New Hampshire Has Decided a Substantial Federal Question Contrary to the Decisions of This Honorable Court.

The Supreme Court of the State of New Hampshire decided that petitioner was not deprived of its property without due process of law or denied the equal protection of the laws within the meaning of the Fourteenth Amendment of the Constitution of the United States, Judge Duncan dissenting, as a result of the juror Korcoulis' seeking and obtaining information prejudicial to the petitioner outside the court room from a person friendly with respondent, and who was not subject to petitioner's cross-examination. (R. 367, 370; App. A, 2A, 3A.)

A. *The Federal Questions Were Timely Raised.*

The federal questions were raised in the trial court by petitioner's motion to vacate order of trial court denying petitioner's motion for new trial and for a new trial filed on November 4, 1955. (R. 320, 321, App. B, 5A-7A.) This was after the case had been remanded by the Supreme Court on the original appeal for the purpose of having the trial court determine whether respondent was liable for additional income taxes on account of receiv-

ing the entire amount of the verdict in one year. (R. 304, App. D, 13A.) There was still pending in the trial court for decision the amount of interest to which respondent was entitled, which the parties at the trial agreed should be decided by the trial court. (R. 197, 260, 353, 356.)

At the time of the filing of petitioner's motion no judgment had been entered either by the Supreme Court or the trial court. (R. 304, App. D, 13A.) In *Williams* v. *Georgia* (1955), 75 S. Ct. 814, 822, 349 U. S. 375, 389, 99 L. ed. 1161, 1173, this Court held that the raising of a federal question even after judgment had been entered on the verdict was timely.*

The Supreme Court of New Hampshire passed on the merits of petitioner's motion raising the federal questions involved, and raised no question of the unseasonableness of petitioner's motion. (R. 367, 368, App. A, 2A, 3A.)

B. *The Judiciary Is Subject to The Provisions of The Fourteenth Amendment.*

The provision "nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws," is a restraint on the judiciary as well as the executive and legislative branches. (*Tumey* v. *Ohio* (1927), 47 S. Ct. 437, 445, 273 U. S. 509, 535, 71 L. ed. 749, 759; *Mooney* v. *Houlihan* (1935), 55 S. Ct. 340, 341, 342, 294 U. S. 103, 112, 79 L. ed. 791, 794.)

These constitutional provisions apply to the jury in both civil and criminal cases (*Thiel* v. *Southern Pacific R. R. Co.* (1946) 66 S. Ct. 984, 985, 328 U. S. 217, 220,

---

* The Fourteenth Amendment is applicable to corporations the same as natural persons. (*Grosjean* v. *American Press Co.*, (1936), 56 S. Ct. 444, 447, 297 U. S. 233, 244, 80 L. ed. 660, 665.)

90 L. ed. 1181, 1184), and also to the conduct of the trial itself. (*Railroad Comm. of California* v. *Pacific G. E. Co.* (1938), 58 S. Ct. 334, 338, 302 U. S. 388, 393, 82 L. ed. 319, 322.) In fact the Fourteenth Amendment provides that no state shall deprive any person of life, liberty or property without due process of law, nor deny an person within its jurisdiction the equal protection of the laws without restrictions.

C. *The Federal Questions Raised Are Substantial.*

The right of a litigant to a fair and impartial trial is one of the most sacred rights guaranteed by the Constitution. (*Baker* v. *Hudspeth* (1942), 129 F (2d) 779, cert. den. 63 S. Ct. 264, 317 U. S. 681, 87 L. ed. 546, reh. den. 63 S. Ct. 767, 317 U. S. 711, 87 L. ed. 1164; *Capital Traction Co.* v. *Hof* (1899), 19 S. Ct. 580, 585, 174 U. S. 1, 15, 43 L. ed. 873, 878.)

II

Petitioner Was Deprived of Its Property Without Due Process of Law.

A. *Due Process Requires a Fair and Impartial Jury.*

The juror Korcoulis obtained information outside the court room for the purpose of helping him come to a decision, according to his own testimony. (R. 263.) Clearly petitioner did not have a fair and impartial jury under such circumstances. This Court either has held expressly or impliedly by denial of certiorari that due process requires a fair and impartial jury.

In *Baker* v. *Hudspeth* (1942), 129 F (2d) 779, 782, cert. den. 63 S. Ct. 264, 317 U. S. 681, 87 L. ed. 546, reh. den. 63 S. Ct. 767, 317 U. S. 711, 87 L. ed. 1164, involving a habeas corpus proceeding, it was held:

"'Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental at-

titude of appropriate indifference, the Constitution lays down no particular tests, and procedure is not chained to any ancient and artificial formula.' *United States* v. *Wood*, 299 U. S. 123, 145, 57 S. Ct. 177, 81 L. ed. 78. But deeply embedded in the right to a fair and impartial trial is the requirement that the jury of twelve men, chosen to sit in judgment, shall have no fixed opinion concerning the guilt or innocence of the one on trial, and that their ultimate verdict shall be based upon the facts as they are submitted to them by the court, under its instructions and superintendence. *Anything less is a farce and a travesty upon justice.*" (*Italics ours.*)

In *U. S.* v. *ex rel. Thompson* v. *Dye* (1952), 103 F. Supp. 776, 778, aff. 203 F (2d) 429, cert. den. 73 S. Ct. 496, 345 U.S. 960, 97 L. Ed. 1380, involving a habeas corpus proceeding, it was held:

> "If an act or inaction of a state violates the concepts of a fair trial, it offends against the due process clause."

In *Hagar* v. *Reclamation District* (1884), 4 S. Ct. 663, 667, 111 U. S. 701, 708, 28 L. ed. 569, 572), in a case involving assessments on lands this Court said:

> "The clause in question, therefore, means that there can be no proceeding against life, liberty or property which may result in the deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights."

In *Tumey* v. *Ohio* (1927), 47 S. Ct. 437, 445, 273 U. S. 509, 535, 71 L. ed. 749, 759, a case in which the appellant was tried and convicted of violating the state liquor laws before a judge who shared in the costs assessed against him on conviction, this Court said:

> "It is finally argued that the evidence shows clearly that the defendant was guilty and that he was only fined $100 which was the minimum amount, and there-

> fore that he can not complain of a lack of due process, either in his conviction or in the amount of the judgment. The plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge. He seasonaly raised the objection and was entitled to halt the trial because of the disqualification of the judge which existed both because of his direct pecuniary interest in the outcome and because of his official motive to convict and to graduate the fine to help the financial needs of the village. There were thus presented at the outset both features of the disqualification."

Remmer v. *U. S.* (1956), 76 S. Ct. 425, 428, 350 U. S. 377, 382, 100 L. ed. 328, 331, was a case involving income tax evasion. One of the jurors was approached by some one outside the court room, who suggested to the juror that he could make some money. The juror strongly repremanded the intruder and reported the matter to the trial judge. Although the juror was extremely conscientious, this Court granted a new trial, observing:

> "He (the juror) had been subject to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sancity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made."

This is *a fortiori* true where the juror himself purposely has sought and obtained evidence outside the court room, because he though it would be helpful in order for him to make a decision.

The petitioner was entitled to an impartial jury, despite the juror's contradictory testimony that the information sought and obtained outside the court room did not affect his verdict.

B. *Due Process Requires Right of Cross Examination.*

Petitioner was deprived of its property without due process of law, because it was deprived of the right of

cross examination of DeNies, a prejudiced witness, whom the juror Korcoulis interviewed outside the court room for the purpose of obtaining information which would be helpful to him in making a decision. In *Market Street Ry Company* v. *Comm.* (1945), 65 S. Ct. 770, 777, 324 U. S. 548, 562, 89 L. ed. 1171, 1182, this Court said:

> "Due process, of course, requires that commissions proceed upon matters in evidence and that parties have opportunity to subject evidence to test of cross examination and rebuttal."

III

Petitioner Was Denied The Equal Protection Of The Laws.

By denying petitioner a new trial with an impartial jury and the right to cross examine the prejudiced witness De Nies, whose testimony the juror, Korcoulis, took outside the court room, for the express purpose of helping him come to a decision, petitioner was denied the equal protection of the laws, which entitles all litigants to a fair and impartial trial. The denial of the equal protection of the laws has been held by this Court to be "a more explicit safeguard of prohibited unfairness than due process of law," (*Bolling* v. *Sharpe*, (1954), 74 S. Ct. 693, 694, 317 U. S. 497, 499, 98 L. ed. 884, 886); and that "It is a command which the State must respect, the benefits of which every person may demand." (*Hill* v. *State of Texas*, (942), 62 S. Ct. 1159, 1162, 316 U. S. 400, 406, 86 L. ed. 1559, 1563.)

PRAYER

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of New Hampshire, commanding that Court to certify

and to send to this Honorable Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 4527, *Walter D. McLaughlin* v. *Union-Leader Corporation*; and that the said judgment of the Supreme Court of New Hampshire may be reversed by this Honorable Court; and that your petitioner may be granted a new trial and have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Respectfully submitted,

UNION-LEADER CORPORATION

By WALTER E. BARTON
Investment Building,
Washington 5, D. C.

ROBERT W. UPTON,
UPTON, SANDERS & UPTON,
14 Park Street,
Concord, N. H.
Counsel for Petitioner.

APPENDIX A

SUPREME COURT OF NEW HAMPSHIRE

Hillsborough,
No. 4527

WALTER D. MCLAUGHLIN v. UNION-LEADER CORPORATION.

Argued October 2, 1956.

Decided November 29, 1956.

MOTIONS SUBSEQUENT TO VERDICT. An action of covenant and assumpsit to recover damages for the breach of a sealed contract of employment of the plainitff by the defendant was tried by jury resulting in a verdict for the plaintiff. The case was transferred here (*McLaughlin* v. *Union-Leader*, 99 N. H. 492) on the defendant's exceptions to rulings of the Court. There was reserved for determination by this court the question "Whether the plaintiff, in the event the verdict is sustained, is entitled to recover further damages on account of any additional Federal Income Taxes he may be required to pay by reason of the receipt of the recovery in one year." We overruled the exceptions of the defendant but declined to answer the question with reference to income taxes on the ground that it did not appear with certainty that the plaintiff would be required to pay such taxes.

After this decision the defendant filed a motion in the Superior Court to vacate the order of that court denying its motion for a new trial. The motion last filed alleged for the first time that the defendant's rights under the Fourteenth Amendment to the Constitution of the United States had been violated. The plaintiff filed requests for findings and rulings with respect to this motion. After hearing the Court denied the motion and in so doing granted all of plaintiff's requests except two. Exceptions

were taken by the plaintiff to the failure to grant all his requests and by the defendant to the granting of the plaintiff's requests and to the denial of its motion. The plaintiff filed a bill of costs in which he claimed interest from the date of the breach and a further sum for depositions which though taken in preparation for trial were not used as evidence in chief therein. To the Court's ruling allowing interest from the "completion" date of the contract both parties excepted and the plaintiff excepted to the disallowance of his claim for the expenses of depositions. The defendant further moved that the plaintiff's claim for damages on account of alleged increases in income taxes which may result from deferred payment of income be dismissed and excepted to the denial of its motion. Further facts appear in the opinion. Reserved and transferred by *Griffith*, J.

McLane, Carleton, Graf, Greene & Brown (*Mr. Brown* orally), for the plaintiff.

Upton, Sanders & Upton (*Mr. Robert W. Upton* orally), for the defendant.

BLANDIN, J. The defendant's contention in support of its motion for a new trial is based on its claim that it did not have an impartial trial and was therefore deprived of the due process and equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States. This argument cannot be accepted. The record of the previous transfer to this court (*McLaughlin* v. *Union-Leader*, 99 N.H. 492) discloses that by its motion for a mistrial and to set aside the verdict the defendant raised the same issues under the state Constitution relative to an impartial trial upon which it now seeks to prevail. The Court by its denial of these motions found as a fact that the jurors were qualified and indifferent and that no matters outside the evidence produced the verdict. Had it found otherwise than that the defendant had an impartial jury

and a fair trial, it would have been the Court's duty to set aside the verdict. It is not to be presumed that the Trial Court failed to obeserve this elementary rule of law. On the contrary, all presumptions are in favor of the legality of its action. *Chabot* vv *Shiner*, 95 N. H. 252, 255; *Lupien* v. *Rousseau*, 98 N. H. 459, 460. As we have previously stated the Court's findings are "entitled to great weight. *McLaughlin* v. *Union-Leader*, *supra*, 499. It has failed to revise its former action and our re-examination of the record discloses nothing to warrant disturbing our former conclusion. It follows that the defendant's exception to the denial of its motion to vacate the order denying a new trial is overruled.

• • • •

This appears to dispose of all exceptions transferred by either party and the order is

Judgment on the verdict.

All concurred except DUNCAN, J. who dissented in part.

DUNCAN, J., *dissenting in part:* I am of the opinion that the denial of the defendant's motion to vacate the order denying a new trial rested upon erroneous rulings of law, and that the defendant is entitled to a consideration of the motion upon its merits by the Presiding Justice below. Otherwise I concur in the opinion of the court.

APPENDIX B

THE STATE OF NEW HAMPSHIRE

Hillsborough, ss. Superior Court

WALTER D. MCLAUGHLIN v. UNION LEADER CORPORATION

Defendant's Motion to Vacate Order Denying Motion for New Trial and for a New Trial

Now comes the Union Leader Corporation, the defendant in the above entitled action, and respectfully represents,—

1. The juror Christos Korcoulis by his misconduct during the trial became disqualified to serve as a juror and incompetent to render a verdict in the case. The unquestioned evidence on defendant's motion for a new trial establishes that he sought and obtained information bearing upon the issues, prejudicial to defendant, from one DeNies, an advertising solicitor employed by the defendant who had worked under the supervision of the plaintiff and was friendly to him. Korcoulis had known DeNies intimately for twenty-eight years and through him carried advertising in the defendant's newspapers under the business style "Lyric Theater". On the evening of the first day of the trial, DeNies called on Korcoulis to obtain a mat needed for the advertising and after some reference to the trial Korcoulis inquired why "they fired" the plaintiff. He followed this up by inquiring whether the plaintiff was "drinking on the job" or abused the salesmen, which DeNies denied. In response to the question "Are you going to be a witness?", DeNies replied, "I hope not because what can I say about the old man? He was all right." Korcoulis then advised DeNies not to testify, telling him that plaintiff's lawyer would "tear you apart". Korcoulis admitted, in the course of his testimony, that he made the inquiries of DeNies because he thought the information "would be helpful in order for me to make a

decision." Again toward the close of the trial he saw DeNies when the testimony of one Finder, a witness for the plaintiff, was the subject of comment prejudicial to the defendant. In these talks Korcoulis' questions and comments and DeNies' answers and remarks were consistently prejudicial to defendant on issues of major importance in the case. In view of his talks with DeNies he must have concluded that defendant's failure to call DeNies and other salesmen as witnesses was because their testimony would show that defendant's claim that plaintiff had failed to perform his duties faithfully and efficiently was unfounded. Korcoulis, in questioning DeNies to find out why they discharged the plaintiff, ceased to be an indifferent juror. Consequently, Korcoulis' participation in the deliberations of the jury rendered the trial unfair and vitiated the verdict resulting from these deliberations.

2. The misconduct of the juror Korcoulis during the trial in interviewing DeNies to ascertain how the plaintiff performed his duties and why he was "fired" by the defendant disqualified him to serve as a juror, rendered him incompetent to participate in the deliberations of the jury and vitiated the resulting verdict.

3. The taking of evidence prejudicial to the defendant on important issues by the juror Korcoulis during the trial rendered the trial legally and essentially unfair and vitiated the resulting verdict.

4. The Juror Korcoulis, by his misconduct in introducing into the case the unsworn and prejudicial evidence obtained by him from DeNies rendered the trial legally and essentially unfair and vitiated the resulting verdict.

5. The denial of defendant's motion for a new trial based on the misconduct of the juror Korcoulis deprives the defendant of the fair trial guaranteed to him by Articles 20, 21 and 35 of the Bill of Rights of the Constitution of New Hampshire.

6. The misconduct of the juror Korcoulis rendered the trial legally and essentially unfair and the resulting verdict, unless set aside, denies to the defendant the equal protection of the laws in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

7. The denial of defendant's motion for a new trial based upon the misconduct of the juror Korcoulis precludes the defendant from having a fair trial and denies to it the equal protection of the laws in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

8. The denial of defendant's motion for a new trial confirms the verdict resulting from a trial essentially and legally unfair because of the misconduct of the juror Korcoulis and denies to the defendant the equal protection of the laws in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

9. The misconduct of the juror Korcoulis rendered the trial legally and essentially unfair, and the resulting verdict unless set aside would deprive the defendant of its property in violation of the "due process clause" of the Fourteenth Amendment to the Constitution of the United States of America.

10. The denial of the defendant's motion for a new trial based upon the misconduct of the juror Korcoulis precludes the defendant from having a fair trial and deprives the defendant of its property without due process of law, in violation of the "due process clause" of the Fourteenth Amendment to the Constitution of the United States of America.

11. The denial of defendant's motion for a new trial confirms a verdict resulting from a trial essentially and legally unfair because of the misconduct of the juror Kor-

coulis and deprives the defendant of its property in violation of the "due process clause" of the Fourteenth Amendment to the Constitution of the United States of America.

WHEREFORE the defendant prays that the order denying the defendant's motion for a new trial be vacated and that a new trial be granted, and for such other relief as may be just.

UNION LEADER
CORPORATION,
By its attorneys,
UPTON, SANDERS &
UPTON,
By Robert W. Upton

Order of Court on Motion: "Mar. 2, 1946 Motion denied. Defendant's exceptions noted. Bill of exceptions or reserved case on or before March 21, 1956 or exceptions waived. See also rulings on plaintiff's requests for findings and rulings on this motion. Robert F. Griffith, Presiding Justice."

APPENDIX C

THE STATE OF NEW HAMPSHIRE

Hillsborough, ss. Superior Court

WALTER D. MCLAUGHLIN v. UNION-LEADER CORPORATION.

Now comes Walter D. McLaughlin and respectfully prays that the Court make the following findings of fact and rulings of law with respect to defendant's Motion to Vacate Order Denying Motion for New Trial and for a New Trial:

1. The motion raises no justiciable issue between the parties because based entirely and specifically on the claimed disqualifications of the juror Korcoulis with respect to which the decision of this Court, affirmed by the Supreme Court of New Hampshire, has become final.

2. The motion raises only moot questions.

3. The matters attempt to raise issues already decided between these parties on which a final decision has previously been rendered.

4. The matters referred to in the motion are *res adjudicata* as between these parties.

5. The stage of the proceedings in this Court at which the federal questions presented in this motion were raised, was upon the filing of this motion, after trial on the merits after transfer to the Supreme Court of New Hampshire, after hearing, decision, rehearing and modification of decision in the Supreme Court of New Hampshire, and after the decision of the Supreme Court of New Hampshire had become final.

6. The motion is dilatory, without merit, and presents no question either of law or of fact.

7. Plaintiff is entitled to counsel fees, and all reasonable costs of litigation in connection with further transfers of any claimed exception to the denial of this motion to any Appellate Courts.

8. The motion is denied.

Respectfully submitted

McLANE, CARLETON,
GRAF, GREENE &
BROWN

Order of Court on Requests: "March 2, 1956 The Court grants requests #1 to 5 and #8 and denies requests #6 and 7. Robert F. Griffith, Presiding Justice."

APPENDIX D

SUPREME COURT OF NEW HAMPSHIRE

Hillsborough,
No. 4396.

WALTER D. MCLAUGHLIN v. UNION-LEADER CORPORATION.

Argued May 4, 1955.

Decided July 8, 1955.

ACTIONS OF COVENANT AND ASSUMPSIT, to recover damages for the alleged breach of a sealed contract of employment of the plaintiff as Advertising Manager for the defendant newspaper publisher for a period of five years beginning November 1, 1947, and executed by the parties on that date. Trial by jury resulted in a verdict for the plaintiff in the sum of $37,745.37. Defendant's exceptions to the admission and exclusion of evidence, the denial of motions for a nonsuit, directed verdict and mistrial, the allowance of argument to the jury by the plaintiff, the denial of requested instructions to the jury and the denial of motions to withdraw certain issues from the jury were reserved and transferred by the Court (*Griffith*, J.) The Court also transferred without ruling a question relating to damages.

* * * *

McLane, Carleton, Graf, Greene & Brown (*Mr. Brown* orally), for the plaintiff.

Upton, Sanders & Upton and *A. Luke Crispe* (*Mr. Robert W. Upton* and *Mr. Sanders* orally), for the defendant.

KENISON, C. J. * * *

The motions for a mistrial and to set aside the verdict involve primarily the misconduct of a juror. This juror,

as proprietor of a theatre, ran a single column advertisment daily in the defendant's newspaper in Manchester costing three or four dollars per day or about $1,200 per year. This was not known to Court or counsel when the jury was impaneled. Early in the trial the juror in conversations with the defendant's soliciting agent for advertising, whom he had known for several years, inquired if the plaintiff was a drinking man, or abused the help and observed that "It is funny they fired him." According to the testimony of the soliciting agent there was a conversation as to a letter by Finder but the juror advised the Court that this was a statement by the soliciting agent which the juror did not answer.

In *Shulinsky* v. *Railroad*, 83 N. H. 86, cited by the defendant, a juror remained silent when asked by the Court during the impaneling of the jury whether he had any business relations or was a creditor or debtor of the plaintiff. The defendant in reliance on information given under the Court's authority did not challenge him. It later appeared that the juror had signed a number of notes with the plaintiff and that there was an outstanding note of $200 at the time of the trial. The verdict was set aside because of the reliance on false information. That case is not controlling here.

It is not any and every business relation that disqualifies a juror and if it did the newspaper subscriber, the telephone user, the electric and water consumer and those who engage in a host of other common everyday habits of ordinary commercial and domestic life would be eliminated from the average jury panel. The juror was asked whether he had any contractual relation "which would interfere with [his] deciding the case fairly." He considered himself a small advertiser and "figured . . . two dollars for a paper or advertising . . . was in the same

class" and consequently did not disclose this relationship. The juror's business relations as a small advertiser with the defendant did not vitiate the selection of the jury. *Roberts* v. *Public Service Co.*, 17 F. Supp. 63. The Trial Court's implied finding that he was in fact indifferent was not erroneous as a matter of law. *State* v. *Sawtelle*, 66 N. H. 488.

The juror's conversations with the defendant's agent were misconduct. The crucial question is whether the juror's misconduct produced the verdict and not whether he misbehaved during the trial. *Blodgett* v. *Park*, 76 N. H. 435, 438; *Caldwell* v. *Yeatman*, 91 N. H. 150, 155. After careful examination of the juror by the Court, evidence produced by the parties and their briefs, the Trial Court has denied the motion for mistrial and the motion to set aside the verdict. This determination is entitled to great weight and is in effect a finding that the verdict was not affected. *State* v. *Ellard*, 95 N. H. 217, 223. The exceptions relating to this issue are overruled.

• • • •

There was reserved for determination by this Court the question "whether the plaintiff, in the event the verdict is sustained, is entitled to recover further damages on account of any additional federal income taxes he may be required to pay by reason of the recovery in one year." Since it does not appear with certainty that the plaintiff will be required to pay additional federal income taxes by reason of the receipt of damages in one year in lieu of salary for several years under the contract, we do not now decide the transferred question. *Dumas* v. *Company*, 92 N. H. 140. If the tax is required to be paid, the question may then be transferred to this court.

All concurred.

Exceptions overruled.

APPENDIX E

THE STATE OF NEW HAMPSHIRE

Hillsborough, ss. Superior Court

WALTER D. MCLAUGHLIN v. UNION-LEADER CORPORATION.

MOTION TO SET ASIDE VERDICT

Filed Nov. 18, 1953

Now comes Union-Leader Corporation, defendant in the above entitled action, and without waiving any exceptions heretofore taken, respectfully represents:

• • • •

4. One or more of the jurors in the case was disqualified.

5. A certain juror who had important business relations with the defendant of such character as to create a bias against the defendant, when interrogated by the Court whether he had any connections, and particularly business connections, with the parties, remained silent, thereby concealing from the Court and counsel his relations with the defendant and creating the impression that he was a fair and impartial juror. The defendant's counsel relied on this false information furnished under the Court's authority, and thereby lost the right to question the qualifications of the juror and the right to challenge him. The said juror, by his misconduct during the trial disclosed his bias against the defendant and rendered the trial unfair.

6. One or more of the jurors was guilty of misconduct which rendered the trial unfair.

7. During the trial matters prejudicial to the said defendant, and outside the evidence, were known to and

considered by one or more jurors, and operated to produce the verdict in favor of the plaintiff.

• • • •

WHEREFORE, the defendant moves that the verdict for the plaintiff be set aside, and for such other and further relief as may be just.

UNION LEADER CORPORATION
By its attorneys,
UPTON, SANDERS & UPTON
By: Robert W. Upton

(Order of Court on Motion: "Feb. 8, 1954, Motion denied. Defendant's exceptions noted. Robert F. Griffith, P. J.")

31

FILED
MAR 2 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 735

UNION LEADER CORPORATION,
Petitioner,

v.

WALTER D. McLAUGHLIN,
Respondent.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

Submitted by

STANLEY M. BROWN, and

McLANE, CARLETON, GRAF, GREENE & BROWN

40 Stark Street

Manchester, New Hampshire

Attorneys for Respondent

SUBJECT INDEX
PETITION FOR WRIT

	PAGE
Opinions Below	3
Jurisdiction	4
Questions Presented	4
Constitutional Questions Involved	4
Statement of the Case	5
Reasons for Denying Certiorari	10
I. The Claim of Federal Rights is Stale	11
II. This Court Should not undertake to re-determine facts found by the Superior Court of New Hampshire	14
III. Conclusion	15

TABLE OF CASES CITED

Williams v. Georgia (1955), 75 S. Ct. 814, 822, 349 U. S. 375, 389, 99 L. ed. 1161, 1173	4, 8, 13, 14, 15
Leavitt v. Benzing, 99 N. H. 103, 195, 107, A. 2d. 682 (1954)	11
DiPietro v. Lavigne, 99 N. H. 173, 174-5, 106 A. 2d. 395 (1954)	11
Martineau v. Waldman, 93 N. H. 386, 42 A. 2d. (1945)	11
Lemire v. Haley, 93 N. H. 206, 39 A. 2d. 10 (1944)	11
Bowdler v. St. Johnsbury Trucking Co., 90 N. H. 68, 69 4 A. 2d. 871 (1939)	11

Valley v. Spaulding Fibre Co., 89 N. H. 558, 199 Atl. 894 (1937) 11

Adams v. Thayer, 86 N. H. 555, 171 Atl. 771 (1934) 11

Desrosier v. New England T. & T. Co., 82 N. H. 405, 134 Atl. 719 (1926) 11

Whittemore v. Boston & Maine RR., 76 N. H. 388, 83 Atl. 125 (1912) 12

Kidd v. New York Sec. & T. Co., 75 N. H. 154, 71 Atl. 878 (1909) 11

Weare v. Deering, 60 N. H. 56 (1880) 11

Plaisted v. Holmes, 58 N. H. 619 (1879) 11

Wright v. Boynton, 40 N. H. 353 (1860) 11

CONSTITUTIONAL PROVISIONS

Art. 20, 21, 35 of Part First, New Hampshire Constitution 13

STATUTES

Title 28, U. S. C. Sec. 1257 (3) 4

In The

Supreme Court of the United States

October Term, 1956

No. 735

Union Leader Corporation,
Petitioner,

v.

Walter D. McLaughlin,
Respondent.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of New Hampshire

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, Walter D. McLaughlin prays that the writ of certiorari herein sought by petitioner Union-Leader Corporation be denied.

OPINIONS BELOW

The decision of the Supreme Court of New Hampshire which decided the issue now sought to be raised was reported in 99 N. H. 402 under date of July 8, 1955. This decision was reviewed on motion for rehearing filed July 19, 1955, and the motion was denied (after modification of the decision on matters not here material) on August 31, 1955. The decision became final as to the issues now sought to be raised, upon the filing of remand overruling the exceptions raised by this appeal, on August 31, 1955.

A further decision of the Supreme Court of New Hampshire, dated November 29, 1956 and reported in 100 N. H. ——, 116 A. 2d 489, disposed of miscellaneous motions subsequent to verdict and subsequent to the first transfer.

JURISDICTION

The relevant final judgment of the Supreme Court of New Hampshire was entered in the Superior Court on September 1, 1955, after rehearing. No writ of certiorari was sought within ninety days thereafter and this Court has no jurisdiction to entertain the petition herein under the express provision of 28 U. S. C. 2101, which limits writs authorized under 28 U. S. C. 1257(3) and requires that the same be filed within ninety days from entry of judgment.

QUESTIONS PRESENTED

1. Whether, under the rule of *Williams* v. *Georgia*, 349 U. S. 375, this Court should sanction stale claims of Federal rights raised for the first time after final decision in a civil case tried in a State court wherein no claim of Federal rights was made at the trial below or on appeal from the trial decision.

2. Whether, under an extension of the rule of *Williams* v. *Georgia*, 349 U. S. 375, this Court should substitute itself for the Superior Court of New Hampshire and make determinations of fact concerning events occurring in that trial court which were claimed to render a civil jury trial unfair.

CONSTITUTIONAL PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

This was a common law action for breach of a contract of employment. McLaughlin had a five-year employment contract at $12,000 per year as Advertising Manager of the Union Leader Corporation covering the period 1947 to 1952. After the sole competing paper was purchased by respondent in 1949, respondent decided it no longer needed McLaughlin and suspended him without cause, replacing him in his position with less expensive help. Trumped-up charges of inefficiency and worse were made after McLaughlin refused to accept a "leave of absence with pay", which charges the jury refused to accept, and the trial result was a verdict for McLaughlin for some $37,745.37. (R. 1-5; 79-104).

During the course of trial the Union-Leader's counsel discovered that one of the jurors (a motion theatre proprietor named Korcoulis) was a regular small advertiser in its paper. It also discovered that *one of its own advertising solicitors*, named DeNies, was regularly seeing this juror to solicit advertising during the course of trial, and that the two men, being friends of 28 years standing, were talking about the trial events as they were happening. They also discovered that the Union-Leader advertising solicitor was not feeding the juror defamatory information about McLaughlin, that the juror had been favorably impressed by plaintiff's evidence, and was anticipating a more meritorious defense that the Union-Leader had to offer. (R. 220).

After considering the tactical situation over an evening, and during the next morning (R. 220-89), Union-Leader counsel, at the mid-morning recess, disclosed the situation to the trial court and reluctantly moved for a mis-trial, but did not press the point (R. 222-14). McLaughlin's counsel sensed a trap play and opposed

the mis-trial (R. 222-21). The trial court denied the motion without prejudice to *either* party to renew it after verdict, saying that he would then rule on the mis-trial, one way or the other, depending upon whether the juror misconduct "evidence is different than has been stated by" Union-Leader counsel (R. 225-10, 223-44).

The trial continued with defendant's case being presented. The Union-Leader did not call its solicitor DeNies as a defense witness. The verdict, as stated above, was for McLaughlin, on November 12, 1953.

The following week, on November 18, 1953, the Union-Leader, petitioner herein, filed a motion to set aside the verdict, on usual grounds, and specifically on the grounds that Korcoulis' claimed disqualification and misconduct rendered the trial unfair (R. 220 to 226). Evidence was taken on these claims, including that of Korcoulis. His testimony included the following evidence:

> "We were talking, passing the time of day. There was no purpose behind those questions I put to him. There wasn't any purpose at all. I think the Court made it clear that we all were to consider what we hear in here and not outside. I got a very good reputation in the City of Manchester so that I am not going to let whatever DeNies said influence my decision one way or the other" (R. 293-8).
>
> The Court: "You say you were not going to consider that as evidence? A. No, of course not." (R. 294-41).
>
> The Court: "When you were drawn on this case, Mr. Korcoulis, did you feel any particular prejudice for either the plaintiff or the defendant? A. No. Q. Did you feel you could decide this case fairly at that time? A. Yes, your Honor. Q. Now, did you consider your conversations with

Mr. DeNies in reaching your decision in this case? A. No, it had no part, no bearing at all, your Honor. In fact, your Honor, why would the Union-Leader change their solicitor yesterday? They didn't change him while I was on the jury." (R. 295-32).

The Court: "Did you disclose your conversation and any information which you may have obtained from Mr. DeNies to any of the other jurors during the case? A. No, your Honor. Q. And if I understand you correctly, you have already stated that you felt, at least, that you did not use that information in reaching your own decision? A. That is right, your Honor. Could I say something, your Honor?" The Court: "Yes. A. Thursday noon I was standing outside the theatre around 11:30, the day before yesterday. This gentleman who works for the Union-Leader walked up to me and said, 'Listen, you know you have taken away our Christmas dinner.' I said, 'What do you mean?' 'Well', he said, 'You gave a verdict to McLaughlin, which means no more profit-sharing for us.' I said, 'I didn't do it. It was eleven other men besides me.' (R. 296-19). • • • I have known everybody in the Union-Leader, . . . They used to pass by the theatre and pass the time of day and now they won't look at me. In other words, if you serve with the jury you are going to be an outcast if you give a just verdict." (R. 296-44).

The trial court, after receiving trial briefs, denied the motion to set the verdict aside, on February 8, 1954. (R. 1 to 5).

A general appeal to the Supreme Court of New Hampshire followed, in which non-suit, directed verdict and trial exceptions were briefed, submitted and decided. As the sixth specification of error, the denial of defendant's motion for mis-trial and to set

aside the verdict because of the claimed disqualification of the juror Korcoulis and his misconduct was specified (See R. 361, *et seq*). Precisely the same partial portrayal of the evidence was urged in that brief as indicating violation of Article 35 of Part 1 of the Constitution of New Hampshire, as is urged herein as indicating violation of the Fourteenth Amendment of the Constitution of the United States (R. 361 to 363). The Supreme Court of New Hampshire affirmed the trial court in its denial of these motions (R. 365).

Thereafter, on July 19, 1955, petitioner herein timely filed motion for rehearing, alleging as one ground, the claimed errors relating to this juror (R. 363). On August 16, 1955, it filed a brief in support of its motion for rehearing, and again argued the same partial view of the facts argued herein (R. 364-365). The Supreme Court of New Hampshire was not impressed. The decision affirming the trial court's action on these matters became final without modification, on August 31, 1955.

Meanwhile, on June 6, 1955, the decision in *Williams* v. *Georgia*, 349 U. S. 375, was announced. This decision apparently came to the attention of petitioner's counsel after its brief on rehearing was filed because it was not brought to the New Hampshire Court's attention. Instead, on November 4, 1955, petitioner moved in the trial court to vacate the February 8, 1954 order denying its November 18, 1953, motion for new trial, resting this motion solely on the juror disqualification ground previously litigated, but this time asserting, for the first time, Federal constitutional rights (R. 320). No new evidence was suggested.

Under New Hampshire procedure decisions on issues raised by exceptions transferred to the State Supreme Court and once decided by that Court become final after rehearing and remand,

and cannot thereafter be raised again. The trial court, therefore, on this new and novel motion, denied it, on the following grounds (R. 322):

"1. The motion raises no justiciable issue between the parties because based entirely and specifically on the claimed disqualification of the juror Korcoulis with respect to which the decision of this Court, affirmed by the Supreme Court of New Hampshire, has become final.

"2. The motion raises only moot questions.

"3. The matters attempt to raise issues already decided between these parties on which a final decision has previously been rendered.

"4. The matters referred to in the motion are *res adjudicata* as between these parties.

"5. The stage of the proceedings in this Court at which the federal questions presented in this motion were raised was upon the filing of this motion, after trial on the merits, after transfer to the Supreme Court of New Hampshire, after hearing, decision, re-hearing and modification of decision in the Supreme Court of New Hampshire, and after the decision of the Supreme Court of New Hampshire had become final."

The defendant promptly excepted to this ruling, again appealed the new "issue" to the Supreme Court of New Hampshire, which Court, on November 29, 1956, affirmed the ruling of the trial court, saying:

"The record of the previous transfer to this court (*McLaughlin* v. *Union-Leader*, 99 N. H. 492) discloses that by its motion for a mis-trial and to set aside the verdict the defendant raised the same issues under the State Constitution relative to an impartial trial upon which it now seeks

to prevail. The Court by its denial of these motions found as a fact that the jurors were qualified and indifferent and that no matters outside the evidence produced the verdict. * * * It has failed to revise its former action and our re-examination of the record discloses nothing to warrant disturbing our former conclusion."

Thus, a Federal question was injected into the instant case after its final disposition on the merits, to permit an application for certiorari to be filed here a year and a half after the same issue had been finally decided as a state constitutional issue.

REASONS FOR DENYING CERTIORARI

The sole complaint of petitioner is its assertion that the juror Korcoulis was disqualified by personal misconduct, and that this disqualification rendered a civil jury trial unfair, with resultant unconstitutional taking of petitioner's property to satisfy the verdict returned.

The sole evidence relied upon for these propositions is the evidence found insufficient to sustain the claim by the Trial Court on February 8, 1954, which finding was affirmed on appeal on July 8, 1955. There was ample evidence before the Trial Court that Korcoulis was in fact an indifferent and proper juror, and that his misconduct did not affect the verdict or render the trial unfair.

The question now is whether this Court can or should substitute its judgment as to the facts, on disputed evidence, in a case where the Supreme Court of New Hampshire has twice declined to do so. There are at least two apparent reasons why this Court should refrain from granting certiorari in this case.

I

THE CLAIM OF FEDERAL RIGHTS IS STALE

Under well settled principles, the Supreme Court of New Hampshire observes the rule that "The orderly and prompt dispatch of justice requires that issues be raised at the earliest practical opportunity." *Leavitt* v. *Benzing*, 99 N. H. 193, 195, 107 A 2d 682 (1954). Also under rules of long standing, the New Hampshire Court does not re-examine, except on rehearing, a question of law once decided, on subsequent transfers of the same case. *DiPietro* v. *Lavigne*, 99 N. H. 173, 174-5, 106 A 2d 395 (1954); *Martineau* v. *Waldman*, 93 N. H. 386, 42 A 2d 735 (1945); *Lemire* v. *Haley*, 93 N. H. 206, 39 A 2d 10 (1944); *Bowdler* v. *St. Johnsbury Trucking Co.*, 90 N. H. 68, 69, 4 A 2d 871 (1939); *Vallee* v. *Spaulding Fibre Co.*, 89 N. H. 558, 199 Atl. 894 (1937); *Adams* v. *Thayer*, 86 N. H. 555, 171 Atl. 771 (1934); *Desrosier* v. *New England T. & T. Co.*, 82 N. H. 405, 134 Atl. 719 (1926); *Kidd* v. *New York Sec. & T. Co.*, 75 N. H. 154, 71 Atl. 878 (1909); *Weare* v. *Deering*, 60 N. H. 56 (1880); *Plaisted* v. *Holmes*, 58 N. H. 619 (1879); *Wright* v. *Boynton*, 40 N. H. 353 (1860).

Because of these rules, the only decision of the Supreme Court of New Hampshire to which any writ of certiorari designed to test the decision on the merits in this case (including the claim of juror disqualification) would lie, is the decision of July 8, 1955 reported in 99 N. H. 492, which finally disposed of these issues between these parties. No writ of certiorari was sought at that time, for the obvious reason that no Federal right had been claimed, on the basis of which to seek the writ.

When the petitioner subsequently attempted to raise a Federal question for the first time after the above decision became final

(Request 5, R. 322, granted at 323), no justiciable issue remained between the parties as to the juror issue, the motion raised only moot questions on issues already decided, which the prior decision had rendered *res adjudicata* as between the parties (Requests 1-4, R. 322, granted at 323).

Quite obviously the second round of attempted litigation was prompted solely to get a subsequent decision of the Supreme Court of New Hampshire in which the claim of Federal right must be referred to, to support application for this writ, as was done in the second transfer of *Whittemore* v. *Boston & Maine RR*, 76 N. H. 388, 83 Atl. 125 (1912), 77 N. H. 61, 86 Atl. 824 (1913), 77 N. H. 593, 90 Atl. 601 (1914). In *Whittemore*, the Federal question had been properly raised on the first transfer, and on the second transfer, the New Hampshire Court said of the first decision:

> "If this decision involved the determination of a federal question, the defendants no doubt can preserve their rights and have the question reviewed in the federal court; but questions once decided in this court are not re-examined in the same case upon a subsequent transfer" (77 N. H. at 62).

On the third transfer, the Court added to the above:

> "No additional reasons are now presented for a reconsideration of the federal question suggested, or for a modification of the opinion given on the first transfer, as reported in 76 N. H. 388. Nor is there occasion for the Court in the exercise of its discretion (*Hedding* v. *Gallagher*, 72 N. H. 377, 379) to again consider the federal question which is again raised by the defendant on the same facts" (77 N. H. at 594).

In the instant case, constitutional considerations related to a fair trial were urged by petitioner in its brief directed to the first

New Hampshire decision (R. 363), but based on the Constitution of New Hampshire and New Hampshire decisions—not based on Federal rights. The New Hampshire Court considered these arguments but found them without merit in light of the Trial Court's "finding that the verdict was not affected" by the juror's misconduct. We respectfully suggest that no Federal concepts of what constitute a fair trial require that this decision be further reviewed. As the New Hampshire Court said in *Wright* v. *Boynton*, 40 N. H. 353 at 356-7:

> "In this way the Court is asked to consider again the questions already passed upon, though in another aspect, and that is, as bearing upon the position that justice has failed to be done, . . . We hold . . . that the questions raised by this application have already been abjudicated, and that the motion for new trial must be denied.

The requirements of a fair trial under the Constitution of New Hampshire are specific and more stringent than the case law based upon the Fourteenth Amendment of the Constitution of the United States. See Art. 20, 21, 35 of Part First, N. H. Const. No peculiarly Federal problem is presented (i. e., color discrimination as involved in *Williams* v. *Georgia*, 349 U. S. 375, for example). Under these circumstances, the stale claim of Federal rights raises no issue not ruled upon previously when the fair trial issue under the State Constitution was considered by the New Hampshire Court. There is no occasion, therefore, for this Court to review the State Court decision, and jurisdiction is lacking because of the provision of 28 U. S. C. 2101.

II

THIS COURT SHOULD NOT UNDERTAKE TO RE-DETERMINE FACTS FOUND BY THE SUPERIOR COURT OF NEW HAMPSHIRE.

In *Williams* v. *Georgia*, 349 U. S. 375, this Court suggested that the Supreme Court of Georgia should re-consider a decision in which it held that Federal rights had been waived. This Court did not go further. The basic assumption of the majority decision in *Williams* v. *Georgia* was that Federal rights of a negro defendant had been violated in the Trial Court and that redress was denied only because of waiver doctrines which prevented review on the merits. This is not such a case.

In the instant case, the Trial Court has found that the trial *was* fair; that the juror's misconduct did *not* affect the result. This finding *has* been reviewed on the merits by the Supreme Court of New Hampshire. No new evidence is involved. There is specific, credible evidence supporting the Trial Court's disposition of the matter.

What then, is there for this Court to accomplish by granting the writ sought? Can it determine as a fact that the juror Korcoulis *did* use information obtained outside of Court to decide this case? Can it determine that Korcoulis did relate this information to other jurors and thus affected their judgment? The evidence is directly to the contrary, in spite of petitioner's arguments here. How can this Court pass on credibility of witnesses not before it? Only if this Court is prepared to go so far is there reason for granting this writ.

This case illustrates, we think, the unwisdom of the approach of *Williams* v. *Georgia*. No Federal right was conceived to be involved here by competent counsel for petitioner until that de-

cision was announced. The entire litigation on the merits had come to a close under appropriate state practice. Then *Williams* v. *Georgia* opened up a new avenue for delay and harassment of the plaintiff below. A complete new litigation originated, posing Federal issues based entirely upon the same facts already litigated through to conclusion on State grounds. No relief on the merits of the controversy is expected. Only delay is sought; only delay is expected to result. The writ should be denied forthwith.

CONCLUSION

We have briefed above the principal reasons why that the writ sought herein should be denied. Not only is the petition untimely. Not only is the relief sought beyond the proper function of this Court. The petition itself is without merit. This petitioner has had a fair trial, and its exceptions have been overruled by the State Courts on the bases argued there. No different result would be reached were the writ granted.

Respectfully submitted,

WALTER D. MCLAUGHLIN, by

STANLEY M. BROWN,

MCLANE, CARLETON, GRAF, GREENE & BROWN

40 Stark Street,
Manchester, New Hampshire
Attorneys for Respondent